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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 730

FRANK V. DILATUSH,
Petitioner,

v.

CHARLES E. WILSON, Secretary of Defense, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Frank V. Dilatush, Appellant below, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on November 1, 1956.

OPINIONS BELOW

The United States District Court for the District of Columbia did not render an opinion but instead entered an order granting a summary judgment to defendants and appellees below. The opinion of the United States Court of Appeals for the District of Columbia is not yet

officially reported but is set forth on page 13 of the Appendix.

JURISDICTION

The judgment of the Uni ed States Court of Appeals for the District of Columbia was entered on November 1, 1956. This petition for certiorari is filed within 90 days thereafter in accordance with the provision of Title 28 U.S.C. Section 2101 (c).

QUESTIONS INVOLVED

1. Whether a federal agency can discharge a permanent preference eligible civil service employee in the absence of a specific finding that such discharge is for cause and will promote the efficiency of the service.

2. Whether a federal agency can discharge a permanent preference eligible civil service employee without advising such employee, so as to enable him to properly prepare his answer, of (1) the identity of witnesses to the alleged acts of misconduct and (2) the dates, time and circumstances of the alleged acts of misconduct.

3. Whether a federal agency can discharge a permanent preference eligible civil service employee for reasons other than those included in the written Notice of Intention to Discharge.

4. Whether an administrative officer can deprive a preference eligible civil service employee of a personal hearing prior to discharge.

STATUTES INVOLVED

Title 5 U.S.C. 863

"No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in

the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: Provided, That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation, and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends: Provided further, That the Civil Service Commission may declare any such preference eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of section 864 of this title. (June 27, 1944, c. 287, Sec. 14, 58 Stat. 390)

STATEMENT OF THE CASE

The petitioner brought this suit against the Secretary of Defense, the Secretary of the Air Force and Members of the United States Civil Service Commission praying for a declaratory judgment, and for a mandatory injunction requiring the defendants to restore him to his position in governmental service.

Prior to discharge petitioner was a preference eligible civil service employee of the Department of the Air Force entitled to all rights, benefits and privileges of the Veterans Preference Act of June 27, 1944.

Petitioner was a $4,330 per year civilian clerk in a Military installation. On November 28, 1952, he filed a formal grievance of incompetence against his section chief, a commissioned officer of the Air Force. Thereafter, on March 13, 1953, while this grievance was still pending, he received a written notice of intention to remove him from the Federal Service. The reasons for removal were denied by petitioner and the animosity created as a result of his charges against the military supervisor were set forth in detail. Petitioner requested a personal hearing before the administrative officer responsible for his removal which was denied. On May 28, 1953, petitioner was removed from his civil service position. He thereafter appealed his discharge to the United States Civil Service Commission in accordance with Section 14 of the Veterans Preference Act and on January 10, 1955, the agency action was affirmed by the Commission.

The United States District Court for the District of Columbia refused to upset the administrative decision, which action was affirmed by the U. S. Court of Appeals for the District of Columbia on November 1, 1956.

SPECIFICATIONS OF ERRORS TO BE URGED

Petitioner will argue that procedural rights guaranteed to him by Section 14 of the Veterans Proference Act of June 27, 1944, as a veteran and as a preference eligible employed in the civil service, were denied him, in that:—

1. A specific finding must be made by the Department of the Air Force that his discharge would be for such cause as will promote the efficiency of the service.
2. Prior to discharge he was entitled to a statement of any and all reasons, specifically and in detail, for the proposed action to be taken against him. (This is particularly significant in view of his categorical denial of the charges; the offering of cogent reason why his superior desired his dismissal; and basing the discharge on conclusions and reasons not contained in the original written charges.)
3. A mandatory procedural safeguard is that the administrative agency must make specific findings that the acts of which the employee is accused were, in fact, committed.
4. The employee is entitled, as a matter of right, to answer charges personally before the administrative officer responsible for his removal.

REASONS FOR GRANTING THIS WRIT

This writ should be granted for the obvious impact which the issues of this case have upon governmental personnel policies. Thousands employed in the civil service on military reservations are entitled to protection afforded by Section 14 of the Veterans Preference Act of June 27, 1944. A civilian employee of the United States Government should not be under the domination of military authority in matters pertaining to the efficient operation of his government. Fear of disciplinary action should never deter a civilian employee from filing a

charge of incompetency or grievance against a military superior.

The United States Court of Appeals for the District of Columbia and the United States Court of Claims have rendered decisions in direct conflict on the question of whether a preference eligible civil service employee is entitled, as a matter of right, to a personal hearing before an administrative officer prior to discharge.

MANDATORY REQUIREMENTS OF SECTION 14

Nowhere in these proceedings has it been established that the Department of the Air Force has fulfilled the mandatory requirements of Section 14 of the Act. The Act specifically requires:

1. That there be a finding that the discharge is for such cause as will promote the efficiency of the service.
2. That the employee have written notice stating any and all reasons, specifically and in detail, for the proposed action.
3. That the employee shall have a reasonable time for answering the charges personally before the administrative officer responsible for the removal.

CONFLICT OF DECISIONS EXISTS AS TO WHETHER PERSONAL HEARINGS IN AGENCY MUST BE AFFORDED PRIOR TO DISCHARGE.

There now exists a direct conflict in decisions between the U. S. Court of Appeals for the District of Columbia and the U. S. Court of Claims on the question of whether a preference eligible civil service employee is, under the Act, entitled to a personal hearing before the administrative officer responsible for his removal.

In *Washington* v. *Summerfield* (1955) 228 F.2d 452 the Circuit Court held that Section 14 of the Act did not provide for a conference or "minimal hearing" for the employee within the administrative agency.

The Court says at page 454:—

> "The Veterans' Preference Act, Sec. 14, Act of June 27, 1944, c. 287, 58 Stat. 390, 5 U.S.C.A. § 863, provides that a veterans preference eligible 'shall be allowed a reasonable time for answering the same (the charges) personally and in writing'. It does not provide for a conference or "minimal hearing", as appellant would urge. We conclude that this means that he shall personally answer the charges in writing. Such has been the administrative practice, with which, in the absence of a misconstruction of the governing statute, we should not interfere."

The Court of Claims in Washington v. U. S., No. 44-56, decided January 16, 1957 (which opinion is set forth in the Appendix at page 15) considered the identical case as was considered by the Circuit Court and found a directly opposite result. The Court said:

> "The phrase "personally and in writing" is clear and unambiguous. It means exactly what it says. A veteran who has been charged with certain offenses and given notice that he is to be discharged from his position is given a reasonable time within which to answer the charges personally if he so chooses, or in writing, or both. We can find nothing in the Veterans' Preference Act or in the legislative history of that act which causes us to believe that Congress intended anything other than what it plainly said, and this court has previously indicated that a veteran is given the right to answer the charges against him in person at the agency level. Wittner v. United States, 110 C. Cls. 231."

Petitioner, prior to discharge, made repeated requests for a personal conference with the administrative officer responsible for removal proceedings. All such requests were denied and, instead, he was referred to a Miss Klenk, an employee relations adviser. The notice of intention to remove petitioner from Federal Service set forth at page 22 of the appendix reads:

> "6. You have the right to reply personally and in writing to this notice of proposed removal, and to

show cause why the action should not be taken. You may submit affidavits and evidence in support of your answer. Your reply must be made within seven (7) days from receipt of this notice. A written reply should be brought or mailed to the undersigned so as to be received not later than March 21, 1953.

"7. You may discuss your case with Miss Isabel Klenk, telephone 2-4225, room 018, Building 15, this Headquarters, (the placement and employee relations adviser) who will advise you on preparation of your reply."

Despite this apparent opportunity to appear personally, such right was denied when request therefor was made. Likewise, all requests for a personal conference or hearing with the administrative officer responsible for removal were denied with instructions that petitioner should consult Miss Klenk.

This issue was not urged in the lower courts because of the decision in *Washington* v. *Summerfield, supra*. In view of the present conflicting opinions and in the interest of justice this Court should now permit petitioner to raise the issue of a personal hearing at the administrative level.

REASONS FOR DISCHARGE MUST BE SUPPORTED BY SPECIFIC FINDING

The Court will read in vain for any reference by the Department of the Air Force that a finding was made that petitioner's discharge was for a cause which would promote the efficiency of the service. Instead, petitioner's discharge is predicated upon unsubstantiated conclusions and reasons. (Appendix page 27).

Reasons given for petitioner's discharge are (1) misconduct, (2) lack of responsibility, (3) failure to offer information to nullify the charges, and (4) failure to answer a question relating to torn documents.

Reasons (3) and (4) are not contained in the written charges served upon petitioner and reasons (1) and (2)

are conclusions unsupported by any facts or findings knowledgable to petitioner. It is elementary to state that conclusions, unsupported by findings, are insufficient to constitute the "reasons" required by Section 14 of the Act. It is urged that the requirement that "reasons" be specifically set forth, is a mandatory procedural safeguard to be strictly adhered to by the administrative agency.

CHARGES MUST BE SPECIFIC AND DETAILED

Specificity and detail are the essence of charges and findings required by the mandatory provisions of the Act and lack of specificity is a fatal procedural error.

Petitioner was charged as principal to a series of events in a chain of circumstances without establishing the identity of witnesses, the date, time or circumstances so as to enable him to refute the allegations. To enumerate a few:

1. Petitioner is charged with having been paid a visit *on or about* February 26, 1953. Who was this individual? What transpired? Petitioner denied knowledge of any visit so how is he to answer the charge without knowing the identity of the visitor and the actual date of the visit?

2. The charges then set forth that "later" petitioner was "observed" removing certain documents "later recovered" and identified. Petitioner denied knowledge of this vague accusation. The obvious query is how much "later"? Was it immediately—hours—days or weeks later? What files were involved? Were they copies or originals? Did the originals remain in the files? How were the documents "later recovered" identified as belonging to petitioner's file? Who "observed" petitioner and when was the observation made? Without identifying the person alleged to have made the observation and the time of such observation, how can petitioner establish

whether such complainant was actually in the room at the time or may have been on leave or taking a coffee-break?

3. Petitioner is also charged with attempting to destroy certain identified documents "a few days prior". Prior to what? How was this destruction attempted; who witnessed it; when were the documents obtained; where were they found; was petitioner present; was petitioner the only one having access to the documents; who saw him and was the observer in a position to see?

4. The charges set forth a telephone call which through innuendo apparently resulted in the destruction of documents. Who were the parties to this conversation, what was said, when was it made, could not petitioner have had several calls over a period of time relative to this matter; how is this call related to the alleged action of petitioner?

5. Did not petitioner's supervisor have sufficient motive for having him removed from office? Did not petitioner file charges of incompetency and deriliction of duty against the supervisor? Does not this raise a question in the minds of administrative officials so as to warrant a specific and detailed letter of charges which would allow petitioner to fully and completely answer each charge and give reasons therefor? Is petitioner's counter-charge of an attempt to "frame" him without fundation? Actually who was responsible—the accused or the accuser?

Clarity and specificity of issues is the very basis for charges seeking the removal of a preference eligible from a civil service position. Ambiguity, vagueness, indefiniteness cannot be tolerated and a mandatory prohibition against such is written into Section 14 of the Act. If the Departments charges were of such specificity and detail as required by the Act then why does the letter of dismissal relate the following? (Appendix page 27)

"2. You were given an opportunity to reply to the charges, and your reply of March 19, 1953, as well as your supplementary letter of April 27, 1953, have been carefully considered. On 13 May 1953, an informal discussion was held in the office of your Branch Chief, attended by you, three representatives of management, and three representatives of the Civilian Personnel Office, *in an attempt to clarify the issues involved* and to be sure that the decision regarding your proposed removal could be made as fairly as possible."

No new or amended charges were filed against petitioner after this informal discussion and the foregoing is a tacit admission of uncertainty and doubt. Petitioner was, therefore, dismissed upon questionable issues.

It is conceded that torn documents had been found and pieced back together. There is vigorous objection, however, to the implication that these torn fragments were the result of a wrongful act by petitioner; that petitioner had access to the particular wastebasket in which these documents were found, and that the torn documents were the only torn papers in the basket. There is no finding of fact on this charge by the Department. In addition, there is no indication as to who recovered the documents, who pieced such documents together or whether such documents exhibited to petitioner were the documents removed from the files and allegedly subsequently found in a torn condition.

Likewise, it is conceded that action was not taken within a six month period upon a stated administrative duty. But was this the responsibility of a $4,330 a year clerk who is accused—or was it the primary responsibility of petitioner's superior against whom petitioner had filed charges of irresponsibility some three months prior to this action. In the absence of specific findings it can be presumed that petitioner was "framed" as he alleged.

The Departmental charges do nothing but set forth a series of events and circumstances which could be applied

to anyone of many employees in similar activities. Petitioner has the right to explain the circumstances but he cannot blindly do so. He must know who his accusers are so that he can prepare a refutation. He must know when, where and how the alleged acts are reported to have taken place so that he can either deny and offer evidence in support thereof, or confess and show circumstances which will justify his action.

In the interest of all preference eligible employees this petition for a writ of certiorari should be granted; otherwise, thousands are subject to being deprived of rights guaranteed to them as veterans and as civil service employees.

WHEREFORE, the petitioner prays that a writ of certiorari may issue under the seal of this Honorable Court in this cause, directed to the United States Court of Appeals for the District of Columbia Circuit, and that upon such a review that the decision and judgment of the Court be vacated, reversed, and set aside, and this cause remanded to the said Court of Appeals in accordance with the views of this Court.

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Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13262

FRANK V. DILATUSH, APPELLANT

v.

CHARLES E. WILSON, Secretary of Defense, et al., APPELLEES

Appeal from the United States District Court for the District of Columbia

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Decided November 1, 1956

Mr. Frank V. Dilatush, appellant, *pro se,* and *Mr. Claude L. Dawson,* for appellant.

Mr. Robert S. Green, Attorney, Department of Justice, of the bar of the Court of Appeals of New York, *pro hac vice,* by special leave of Court, with whom *Messrs. Oliver Gasch,* United States Attorney, and *Melvin Richter,* Attorney, Department of Justice, were on the brief, for appellees. *Mr. Lewis Carroll,* Assistant United States Attorney, also entered an appearance for appellees.

Before EDGERTON, *Chief Judge,* and PRETTYMAN and FAHY, *Circuit Judges.*

PER CURIAM: The District Court granted the motion of appellees [1] for summary judgment and denied that of appellant. He had sued in the District Court for a declaratory judgment that he had been unlawfully discharged from Government service and for kindred relief. As an employee eligible for veteran's preference he alleged in the District Court and here contends that his discharge did not accord with the procedural requirements of section 14 of the Veterans Preference Act, 58 Stat. 390 (1944), as amended, 5 U.S.C. § 863 (1952). Particularly he contends that the notice given him of the reasons for his proposed discharge was lacking in the required specificity and detail, and also that the action finally taken was not supported by proper findings and the reasons assigned therefor did not conform with those of which he had been given notice. No issues of fact were involved. The questions for decision in the District Court were the sufficiency in law of the findings and procedures followed by appellees. Accordingly the court properly decided the case on motion for summary judgment.

We conclude that the findings and proceedings which eventuated in appellant's discharge met the requirements of the applicable statute and regulations. See *Blackman* v. *Lee*, 92 U.S. App. D.C. 268, 205 F.2d 13.

Affirmed.

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[1] Appellees, defendants in the District Court, are the Secretary of Defense, the Secretary of the Air Force, and the Chairman and Members of the Civil Service Commission, all described in the complaint by name as well as by office.

IN THE UNITED STATES COURT OF CLAIMS

No. 44-56

(Decided January 16, 1957)

WILLIAM ODY WASHINGTON v. THE UNITED STATES

Mr. Frank Smith for the plaintiff.

Mr. Herbert M. Canter, with whom was *Mr. Assistant Attorney General George Cochran Doub,* for the defendant.

ON DEFENDANT'S AND PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT

JONES, *Chief Judge,* delivered the opinion of the court:

Plaintiff, a preference eligible within the meaning of the Veterans' Preference Act of 1944, as amended, 5 U. S. C. § 851, *et seq.,* sues to recover wages which he alleges are due him as a result of his unlawful removal from his position as a clerk in the City Post Office of the District of Columbia. Both parties move for summary judgment.

There is no dispute as to the facts involved in this case. Prior to November 22, 1952, plaintiff was employed as a clerk in the Post Office Department, Bureau of Post Office Operations, Washington, D. C. On July 7, 1952, the Postmaster for the District of Columia notified plaintiff by letter that in view of his unsatisfactory scheme examination record, disciplinary action would be necesary unless immediate improvement was shown. On September 18, 1952, plaintiff was given an unsatisfactory efficiency rating effective September 15, 1952. The reasons given for this action were plaintiff's unsatisfactory scheme examination record, his absences from duty without permission, and his failure to comply with instructions.

By letter dated October 16, 1952, the Postmaster charged the plaintiff with "unsatisfactory scheme examinations" and "unsatisfactory attendance." Details of each charge were set forth and plaintiff was informed of his right to answer the charges "personally and in writing." In a letter to the Postmaster dated October 21, 1952, plaintiff, in effect, admitted the charges against him and set forth certain extenuating circumstances stemming from financial and marital difficulties. He concluded his letter with a request to see the Postmaster personally so that he could explain his case more fully. Subsequently, in a letter to the Postmaster dated November 20, 1952, plaintiff stated that he had attempted to see the Postmaster personally but had "been blocked at every attempt." This letter set out in detail the marital and financial difficulties of the plaintiff and requested that he be given "another chance."

On October 29, 1952, the Postmaster forwarded a copy of the letter of charges, dated October 21, 1952, to the Assistant Postmaster General with a request that authority be issued for plaintiff's removal. The Postmaster's accompanying letter set forth additional irregularities in plaintiff's performance which did not appear in the letter of charges served on plaintiff.

On November 6, 1952, the Assistant Postmaster General notified the plaintiff that his removal from the position of Clerk had been authorized effective November 22, 1952. This letter made reference to the charges preferred against plaintiff for unsatisfactory scheme examination and unsatisfactory attendance. On November 7, 1952, the Postmaster notified plaintiff of his removal which was to become effective at the close of business on November 22, 1952. The Postmaster's letter stated that this action was being taken after the Post Office Department had given careful consideration to the charges preferred against the plaintiff for unsatisfactory scheme examination and unsatisfactory attendance.

Thereafter, plaintiff appealed his removal to the Fourth

United States Civil Service Region of the United States Civil Service Commission. He submitted an affidavit and on January 26, 1953, a *de novo* hearing was held. Plaintiff was represented by counsel and did not testify in his own behalf. On February 19, 1953, the Fourth Region rendered an opinion upholding plaintiff's removal.

Plaintiff then appealed to the Board of Appeals and Review of the Civil Service Commission, and on October 30, 1953, that Board sustained the decision of the Fourth Region. Plaintiff next appealed to the Commissioners of the Civil Service Commission and by letter dated May 25, 1954, the Commissioners upheld plaintiff's dismissal by the Post Office Department.

On August 6, 1954, plaintiff filed a complaint in the District Court for the District of Columbia (Civil No. 3360-54) seeking a declaratory judgment that his removal was not in accordance with law, and praying for reinstatement. On cross-motions for summary judgment, the District Court held that plaintiff was not entitled to reinstatement, and on November 23, 1955, the Court of Appeals for the District of Columbia affirmed the action of the district court in *Washington* v. *Summerfield* (No. 12,644, decided November 23, 1955).

Plaintiff does not allege that the administrative action taken in the present case was arbitrary or capricious or so clearly erroneous as to impute bad faith. He contends merely that certain procedural rights given him by the Veterans' Preference Act were denied him by the Post Office Department. In this situation we are not authorized to consider the merits of plaintiff's case but merely whether or not his procedural rights have been violated. *Eberlein* v. *United States,* 257 U. S. 82; *Engelhardt* v. *United States,* 125 C. Cls. 603; *O'Brien* v. *United States,* 124 C. Cls. 655.

Plaintiff takes the position that the Post Office Department, in removing him from his position as clerk, denied

him two of his procedural rights under section 14 of the Veterans' Preference Act. First, he alleges that he was denied his right to be heard in person by the Postmaster, and, second, he alleges that his removal was based upon charges other than those communicated to him in the letter of charges dated October 16, 1952.

The defendant denies that plaintiff's rights were violated in any way.

Section 14 of the Veterans' Preference Act of 1944, 5 U.S.C. § 863, provides as follows:

> No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person * * * shall have at least thirty days' advance written notice * * * stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: *Provided,* That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, * * *.

We shall first consider plaintiff's allegation that his removal was based upon charges other than those communicated to him in the letter of charges, dated October 16, 1952. The basis for this allegation is the fact that on October 29, 1952, when the Postmaster forwarded a copy of the letter of charges to the Assistant Postmaster General, the accompanying letter set forth additional irregularities in plaintiff's conduct which were not contained in the letter of charges.

A careful examination of the record has failed to reveal that plaintiff's removal was based upon any charges other than the two specific ones set out in detail in the Postmaster's letter of charges to plaintiff. When the Assistant Postmaster General notified plaintiff that his removal had been authorized, the letter of notification referred only to these two specific charges. This was also true of the Postmaster's letter notifying plaintiff of the effective date of his removal. The case was subsequently heard *de novo* by the Fourth Region of the Civil Service Commission and in its opinion the Fourth Region made it absolutely clear that it was concerned only with the two specific charges preferred against the plaintiff in the letter of charges.

There is nothing in the record to indicate that the additional irregularities referred to be the Postmaster in his letter of October 29, 1952, were ever considered by anyone in connection with plaintiff's removal. The mere fact that these additional irregularities were mentioned in the letter is insufficient to support the conclusion that plaintiff's removal was based in part upon such irregularities. In the light of the record we must conclude that there is no merit in plaintiff's contentions that his removal was based in part upon charges not communicated to him.

Plaintiff's other contention, i. e., that he was denied his procedural right under the Veterans' Preference Act to be heard in person in the agency of his employment, presents

a more difficult problem. Plaintiff bases this contention upon that portion of section 14 of the act which provides as follows:

> * * * such preference eligible shall be allowed a reasonable time for answering the same [the charges preferred against him] *personally and in writing.* (Emphasis added.)

The defendant takes the position that the section does not give plaintiff the right to appear personally at the agency level to answer the charges but merely gives him the right to answer the charges in writing. We can not accept this interpretation.

The phrase "personally and in writing" is clear and unambiguous. It means exactly what it says. A veteran who has been charged with certain offenses and given notice that he is to be discharged from his position is given a reasonable time within which to answer the charges personally if he so chooses, or in writing, or both. We can find nothing in the Veterans' Preference Act or in the legislative history of that act which causes us to believe that Congress intended anything other than what it plainly said, and this court has previously indicated that a veteran is given the right to answer the charges against him in person at the agency level. *Wittner* v. *United States,* 110 C. Cls. 231.

Defendant further contends that even if the plaintiff was entitled to a personal hearing at the agency level, this right was waived since he, in effect, admitted the charges against him. While it is true that the plaintiff did not deny his guilt in his letter to the Postmaster dated October 21, 1952, he ended the letter with the following statement:

> If you will give me an opportunity to come in to see you personally, I am certain that I can explain my case more fully.

We believe that this language constituted a definite request by plaintiff for a personal hearing.

To "answer" to charges, or claims, one need not necessarily plead the general issue, denying that he did the things which he is alleged to have done. He may plead in confession and avoidance, and that is an answer, in law, and in life. In employment relations particularly, mitigating circumstances, often of a highly personal nature, may save a job for a person who, but for these circumstances, would and should be discharged. Whether, if the plaintiff had been permitted to make this kind of a personal appeal to his superior, it would have saved his job, we do not know. But when Congress gave to the veteran the right to appear personally, it must have intended to give him the chance of succeeding in such an appeal. The naked facts, without the personal appeal, could be just as well stated in writing. And Congress knew, as we all know, that bureaucratic superiors, like other human beings, are susceptible to the effects of personal appeals.

The procedural rights of a veteran under section 14 are clear and simple. In the present case one of those rights was denied. The plaintiff was denied his right to answer the charges against him in person at the agency level. The fact that he was subsequently given a *de novo* hearing at a higher level does not cure this procedural defect. Since the agency did not follow the procedure laid down by Congress plaintiff's discharge was unlawful.

Defendant's motion for summary judgment is denied and plaintiff's motion for summary judgment is granted. Plaintiff is entitled to recover and judgment will be entered to that effect. The amount of recovery will be determined pursuant to Rule 38 (c).

It is so ordered.

LARAMORE, *Judge;* MADDEN, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge,* concur.

HEADQUARTERS
AIR MATERIAL COMMAND

Wright-Patterson Air Force Base, Ohio

March 13, 1953

SUBJECT: Removal—Misconduct
THRU: MCPPEE
TO: Frank V. Dilatush

1. This is your official notification that you are being considered for removal from the Federal Service due to your misconduct and lack of responsibility in the performance of your duties as Contract Specialist, grade GS-1102-7, salary $4330.00 per annum, in the Power Plant Section of the Aeronautical Equipment Branch, Procurement Division.

2. You have demonstrated your misconduct and lack of responsibility by attempting to destroy, i.e., tearing into small pieces and depositing in your waste basket, certain signed original documents having a direct bearing on your regularly assigned duties. These documents were recovered, pieced together, and are available for examination by you or any other interested person or persons. The documents under discussion are listed and described here:

a. Disposition Form, 9 April 1952, Subject: "Time Compliance Technical Orders and ECP's for Aircooled Motors O-335-4-5, YO-335-5, O-425-1", from MCMMXF to MCPPAE55.

b. Disposition Form, 7 June 1952, Subject: same as in a. above, from MCPPAE55 to MCMMXF-11. It is noted that you prepared this Disposition Form in answer to the Disposition Form described in a. above, and coordinated it with your signature.

c. Disposition Form, Comment 2 to Disposition Form described in b. above, dated 13 June 1952, from MCMF to MCPPAE-55. In further explanation you will no doubt

recall that a representative from MCPPBO, Data Unit, Production Control Office, came to your desk on or about 25 February 1953 to see why—in view of the interchange represented by the documents listed earlier in this paragraph under a., b., and c.,—Provisions for Technical Order Compliance had not been included in Supplemental Agreement No. 17 to AF (33-038)-22896, for which you were responsible, and that you disclaimed any knowledge or receipt of those documents or of Aircraft Subdivision Policy Memo No. 6 dated 19 April 1952 or Amendment No. 1 thereto dated 8 May 1952, which set up the
34 requirement for Technical Order Compliance in lieu of Service Bulletins. Later—and after you had received a telephone call on this same matter—you were observed extracting from your files certain documents later recovered and identified as those listed under a., b., and c. above, and tearing them up and depositing them in your waste basket.

d. Letter from Aircooled Motors, Inc., dated 2 December 1952, addressed to the attention of MCPPAE-55, Subject: "Service Bulletins for O-335 Engines." This letter has a direct bearing on the Service Bulletin situation which eventually resulted in Supplemental Agreement No. 17 to contract AF(33-038)-22896 which established contractual coverage and money for the Service Bulletins rather than for the Time Compliance Technical Orders as required under the Aircraft Subdivision Policy Memo No. 6 and Amendment No. 1 thereto mentioned earlier in this paragraph.

e. Your letter 25 November 1952 to Commander General, SAAMA, Kelly Air Force Base, Texas, Subject: "Contract AF 33(600)-18388, Item No. 7, Change Order No. 3".

f. First Indorsement from Hq. SAAMA, Kelly Air Force Base, Texas, which is an answer to letter described in e. above.

Letter—e. above—replied to copy of SAAMA, letter of 29 August 1952 to Aircooled Motors through Rochester Regional Office, which asked, among other things, for deletion of Item 171, Valves, Part No. 0238-*18285* as these were being procured under another item on the contract, your letter stating that the 29 August letter was wrong and that the referenced part number in that letter was 0238-*18258*. (Stock number was correct and part number was transposed).

First Indorsement—f. above—answers your letter—e. above—and reiterates what was stated in the 29 August letter, i.e., that the part number of 0258-*18285* (reference to the file copy of the SAAMA letter of 29 August 1952 discloses reference to be 0258-18285 as stated by SAAMA). The attempt to destroy documents, identified as e. and f. above was a few days prior to the attempted destruction of a., b., c., and d.

Copy of SAAMA letter 29 August 1952 was forwarded to this Headquarters from the Rochester Air Regional Office with its transmittal letter of 11 September 1952 (NEHRSSC/GEF/MIS), the third paragraph of this transmittal letter reading as follows: "It is requested that you initiate action to incorporate the changes referred to in referenced letter", (29 August letter from SAAMA).

The action referred to was in connection with Item No. 7 to Contract AF 33(600) 18388 (Items 171 and 286 of Exhibit A2, and new items 105a and 310a). Items 171 and 286, the over all cost of which on the priced exhibit was $5,831.17, were to be cancelled, and items 105a and 310a, not then on contract, were to be procured. No Contractual action was taken to either cancel the items or procure the items as requested. The possible result from non-accomplishment of that action, which was your responsibility, would have been a useless expenditure of up to $5,831.17 on the one hand and on the other a critical shortage position on the two items not

procured. Had Items that you failed to procure been required for combat engines the effect might well have been very serious and far reaching.

Mr. Chadwick of Aircooled Motors received shipping instructions on the contract pursuant to OTT 12-1616 on 19 December 1952 with a note from SAAMA to the effect Items 171 and 286 were to be deleted. That is the reason no cost was incurred as Mr. Chadwick had already—on 14 October—quoted SAAMA on the two (2) items (105a and 310a) to be procured and agreed to incur no cost on the items (171 and 286) that were to be deleted. In telephone conversation with this Headquarters 10 March 1952, Mr. Chadwick stated that he could not understand why there had been no further contractual action. This lack of proper action on your part during this six months period, and your subsequent attempt to destroy original signed correspondence relating to it are considered conclusive evidence of lack of responsibility and misconduct.

3. There is no information available on the relative cost of the Service Bulletins which were furnished pursuant to Supplemental Agreement No. 17 of Contract W33-(038) 22896 and the Time Compliance Technical Orders that should have been furnished (see subparagraphs a, b, and c, of preceeding paragraph 2).

4. The Base Security Officer will be informed of the general content of the preceding paragraphs for such action as may be deemed necessary in connection with your security clearance.

5. In accordance with the Veterans Preferance Act of 1944 you are being given thirty (30) days advance notice of the proposed removal action. During this thirty (30) day period you will be retained in a work status, and will be assigned duties by the Unit Chief of your organizational component. You will not be permitted to exercise sole custody of correspondence files pertaining to contracts

on which you would normally perform administrative functions, nor on new procurements which normally would require your services in a negotiating capacity.

6. You have the right to reply personally and in writing to this notice of proposed removal, and to show cause why the action should not be taken. You may submit affidavits and evidence in support of your answer. Your reply must be made within seven (7) days from receipt of this notice. A written reply should be brought or mailed to the undersigned so as to be received not later than March 21, 1953.

7. You may discuss your case with Miss Isabel Klenk, telephone 2-4225, room 018, Building 15, this Headquarters (the placement and employee relations adviser) who will advise you on preparation of your reply.

36 8. No decision to separate you has been made, or will be made until after the time allowed for your reply. Your reply will be given careful consideration before final decision is made. Whether you reply or not, a written notice of final decision will be given you.

/s/ Charles F. Burley
CHARLES F. BURLEY
Lt. Colonel, USAF
Chief, Aeronautical
Equipment Branch
Procurement Division

HEADQUARTERS

WRIGHT-PATTERSON AIR FORCE BASE
OHIO

28 May 1953

EWACUB
SUBJECT: Removal—Misconduct
THRU: MCPPEE
TO: Mr. Frank V. Dilatush

1. You are advised that the decision has been made to remove you from the Federal service due to misconduct. You were notified by letter dated 13 March 1953 from the Chief of the Aeronautical Equipment Branch that removal action was contemplated because of misconduct and lack of responsibility as demonstrated by your attempt to destroy certain signed original documents having a direct bearing on your regularly assigned duties. The specific documents were identified in that letter, and were later made available for your personal inspection.

2. You were given an opportunity to reply to the charges, and your reply of March 19, 1953, as well as your supplementary letter of April 27, 1953, have been carefully considered. On 13 May 1953, an informal discussion was held in the office of your Branch Chief, attended by you, three representatives of management, and three representatives of the Civilian Personnel Office, in an attempt to clarify the issues involved and to be sure that the decision regarding your proposed removal could be made as fairly as possible.

3. The documents involved internal correspondence within Headquarters, Air Material Command and correspondence with Headquarters, SAAMA, Kelly Air Force Base, Texas, pertaining to the requirement for Time Compliance Technical Orders as opposed to Service Bulletins pertaining to two contracts with the same firm. The pieces of the torn correspondence between your office and the

Maintenance Division of this Headquarters were found in a waste basket near your desk shortly after you denied any knowledge of such correspondence, although you had personally dictated and coordinated a part of it. Since both sets of correspondence pertained to situations where you had failed to take proper action for which you were responsible regarding Air Force Procurement Contracts, and since you have offered no information to nullify the charges, the decision has been made to remove you from the service. At no time have you given a direct answer to the question, "Did you attempt to destroy the documents in question?" Instead, you have attempted to answer the charges against you by making counter charges of conspiracy to "frame" you against other personnel of your immediate office.

38 4. It is noted that in your letters of reply to the charges, you have stressed the fact that you are an attorney. Your education and legal experience make the offense especially serious. The lack of responsibility which has been demonstrated is most unfortunate in a man of your years and background, and gives rise to justified doubt as to your suitability for government employment. You are most fortunate, indeed, that loss of life or loss or damage to government aircraft did not result from your misconduct.

5. If you so desire, you may appeal this decision under the Air Force grievance procedure established by Chapter AF E2 of Air Force Manual 40-1. Appeal under the Air Force grievance procedure must be made in writing within thirty (30) days after the effective date of your removal. The appeal should be addressed to the Commanding General, Wright-Patterson Air Force Base, Ohio, Attention: EWACUB.

6. You are also advised of your right to appeal to the Civil Service Commission under Section 14, of the Veterans' Preference Act. Any such appeal should be addressed

to the Sixth United States Civil Service Region, United States Post Office and Courthouse Building, Cincinnati 2, Ohio, and must be received in that office within ten (10) days from the effective date of your separation.

7. You should understand, however, that if an appeal is accepted by the Civil Service Commission, no future appeal of your removal may be made under the Air Force grievance procedure and action on any appeal you may already have made will cease.

8. Standard form 50, "Notification of Personnel Action," showing the effective date of your removal is enclosed and you should report to your Placement and Employee Relations Adviser, Miss Klenk, whose office is located at Room 018, Building 15, Area B, immediately upon receipt of this letter in order to complete your clearance.

9. The original letter of charges is returned to you for your disposition, and a copy of the letter recently addressed to your attorney is also enclosed.

BY COMMAND OF BRIGADIER GENERAL BROWN:

/s/ C. E. Gray
C. E. GRAY
Chief, Civilian Personnel
Branch
Directorate, Base Personnel
and Training

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418039—57——1

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 730

FRANK V. DILATUSH, PETITIONER

v.

CHARLES E. WILSON, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion. The *per curiam* opinion of the Court of Appeals (Pet. App. 13—14) is reported at 239 F. 2d 44.

JURISDICTION

The judgment of the Court of Appeals was entered November 1, 1956 (R. 39). The petition for a writ of certiorari was filed on January 30, 1957. The jurisdiction of this Court is presumably invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether petitioner's dismissal from his Government employment was in accord with the procedural

requirements of Section 14 of the Veterans' Preference Act.

STATUTE INVOLVED

Section 14 of the Veterans' Preference Act of 1944, 58 Stat. 387, 390, as amended, 5 U. S. C. 863, provides in pertinent part:

> No permanent or indefinite preference eligible * * * shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: * * *.

STATEMENT

This is a dismissal case in which petitioner, an honorably discharged veteran, claims that respondents'

actions in dismissing him from Government service were in violation of Section 14 of the Veterans' Preference Act, *supra*, p. 2.

In his complaint in the District Court, petitioner alleged: (1) that the Statement of Charges leading to his dismissal was not sufficiently specific (R. 5); and (2) that the Letter of Dismissal contains no finding of guilt and no express determination that the dismissal was for such cause as would promote the efficiency of the service (R. 5–6). He sought a declaratory judgment that his dismissal was unlawful and an injunction ordering his reinstatement (R. 7). Upon cross motions for summary judgement, the District Court granted respondents' motion and denied that of petitioner. The Court of Appeals affirmed, holding " * * * that the findings and proceedings which eventuated in [petitioner's] discharge met the requirement of the applicable statute and regulations" (Pet. App. 14).

The facts, as disclosed by the affidavits and documents attached to the respective motions, are as follows:

The Statement of Charges. Petitioner was employed by the United States at Wright-Patterson Material Field, Dayton, Ohio, as a Contract Specialist, GS–7 (Pet. App. 22). On March 13, 1953, he was served with a Statement of Charges advising him that he was being considered for removal from the Federal Service for "misconduct and lack of responsibility" (Pet. App. 22). Headed "Removal—Misconduct," the Statement of Charges in paragraph 1 advised petitioner "This is your official notification that you are

being considered for removal from the Federal Service due to your misconduct and lack of responsibility in the performance of your duties as Contract Specialist * * *." (Pet. App. 22). Paragraph 2 stated (Pet. App. 22):

> You have demonstrated your misconduct and lack of responsibility by attempting to destroy, i. e., tearing into small pieces and depositing in your waste basket, certain signed original documents having a direct bearing on your regularly assigned duties. These documents were recovered, pieced together, and are available for examination by you or any other interested person or persons. * * *

Under subparagraphs a, b, and c, the Statement listed and specifically described by date and subject matter the three documents so destroyed (Pet. App. 22–23).[1] "In further explanation," the Statement advised petitioner (Pet. App. 22–23) that a representative from the Production Control Office

> came to your desk on or about 26 February 1953 to see why—in view of the interchange represented by the documents listed earlier in

[1] The three documents were described in the letter as follows:

"a. Disposition Form, 9 April 1952, Subject: 'Time Compliance Technical Orders and ECP's for Aircooled Motors 0–335–4–5, YO–335–5, 0–425–1', from MCMMXF to MCPPAE55.

"b. Disposition Form, 7 June 1952, Subject: same as in a. above, from MCPPAE55 to MCMMXF–11. It is noted that you prepared this Disposition Form in answer to the Disposition Form described in a. above, and coordinated it with your signature.

"c. Disposition Form, Comment 2 to Disposition Form described in b. above, dated 13 June 1952, from MCMF to MCPPAE–55."

> this paragraph under a., b., and c.,—Provisions for Technical Order Compliance had not been included in Supplemental Agreement No. 17 to AF (33–038)–22896, for which you were responsible, and that you disclaimed any knowledge or receipt of those documents or of Aircraft Subdivision Policy Memo No. 6 dated 19 April 1952 or Amendment No. 1 thereto dated 8 May 1952, which set up the requirement for Technical Order Compliance in lieu of Service Bulletins. Later—and after you had received a telephone call on this same matter—you were observed extracting from your files certain documents later recovered and identified as those listed under a., b., and c. above, and tearing them up and depositing them in your waste basket.

The Statement of Charges then listed, under subparagraphs d, e, and f, three additional documents which petitioner had similarly destroyed, likewise describing these documents in great detail [*] and stating that (Pet. App. 24):

> * * * The attempt to destroy documents, identified as e. and f. above was a few days prior to the attempted destruction of a., b., c., and d.

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[*] The letter described these documents as follows (Pet. App. 23):

"d. Letter from Aircooled Motors, Inc., dated 2 December 1952, addressed to the attention of MCPPAE–55, Subject: 'Service Bulletins for O–335 Engines.' This letter has a direct bearing on the Service Bulletin situation which eventually resulted in Supplemental Agreement No. 17 to contract AF (33–038)–22896 which established contractual coverage and money for the Service Bulletins rather than for the Time Compliance Technical Orders as required under the Aircraft Subdivision

The Statement pointed out that these documents involved certain proposed changes in a contract for procurement of airplane parts and that petitioner had been requested to initiate action to incorporate such change (Pet. App. 24). It noted that no such action was taken by petitioner and advised him of the serious consequences that might have resulted from such inaction on his part (Pet. App. 24–25).[1] Paragraph 2 of the Statement of Charges concluded (Pet. App. 25):

> * * * This lack of proper action on your part during this six months period, and your

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Policy Memo No. 6 and Amendment No. 1 thereto mentioned earlier in this paragraph.

"e. Your letter 25 November 1952 to Commanding General, SAAMA, Kelly Air Force Base, Texas, Subject: 'Contract AF 33 (600)-18388, Item No. 7, Change Order No. 3'.

"f. First Indorsement from Hq. SAAMA, Kelly Air Force Base, Texas, which is an answer to letter described in e. above. Letter—e. above—replied to copy of SAAMA, letter of 29 August 1952 to Aircooled Motors through Rochester Regional Office, which asked, among other things, for deletion of Item 171, Valves, Part No. 0238–*18285* as these were being procured under another item on the contract, your letter stating that the 29 August letter was wrong and that the referenced part number in that letter was 0238–*18258*. (Stock number was correct and part number was transposed).

"First Indorsement—f. above—answers your letter—e. above—and reiterates what was stated in the 29 August letter, *i. e.*, that the part number of 0258–*18285* (reference to the file copy of the SAAMA letter of 29 August 1952 discloses reference to be 0258–18285 as stated by SAAMA). * * *"

[1] In the succeeding paragraphs, the Statement informed petitioner of his rights under the Veterans' Preference Act (Pet. 25–26). It concluded by advising him that no decision to separate him would be made until after the time allowed for his reply, and that this reply would be given careful consideration before final decision was made. (Pet. App. 26).

> subsequent attempt to destroy original signed correspondence relating to it are considered conclusive evidence of lack of responsibility and misconduct.[4]

The Letter of Dismissal. On March 19, 1953, and again on April 27, 1953, petitioner submitted written answers to the charges (Pet. App. 27). On May 13, 1953, a conference was held on the matter in the office of petitioner's Branch Chief, attended by petitioner, three representatives of management, and three representatives of the Civilian Personnel Office (Pet. App. 27). On May 28, 1953, petitioner was advised by the Chief of the Civilian Personnel Branch of the decision to remove him (Pet. App. 27). The Letter of Dismissal referred to the Statement of Charges, which it noted had advised petitioner (Pet. App. 27):

> * * * that removal action was contemplated because of misconduct and lack of responsibility as demonstrated by your attempt to destroy certain signed original documents having a direct bearing on your regularly assigned duties. * * *

and again pointed out that the specific documents were identified in that Statement and were made

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[4] In this connection, the charges stated (Pet. App. 24–25):

"* * * The possible result from non-accomplishment of that action, which was your responsibility, would have been a useless expenditure of up to $5,831.17 on the one hand and on the other a critical shortage position on the two items not procured. Had Items that you failed to procure been required for combat engines the effect might well have been very serious and far reaching."

The next paragraph of the statement (Pet. App. 25) explained how such damage was fortuitously avoided.

available for his personal inspection. The Letter further stated that his answers had been "carefully considered" and that the May 13, 1952, conference had been held "in an attempt to clarify the issues involved and to be sure that the decision regarding your proposed removal could be made as fairly as possible" (Pet. App. 27).

The Letter of Dismissal summarized the correspondence involved and pointed out that the pieces of torn correspondence were found in a waste basket near petitioner's desk after he had denied any knowledge of such correspondence although he had personally dictated and coordinated a part of it. The Letter continued (Pet. App. 28):

> * * * Since both sets of correspondence pertained to situations where you had failed to take proper action for which you were responsible regarding Air Force Procurement Contracts, and since you have offered no information to nullify the charges, the decision has been made to remove you from the service. *At no time have you given a direct answer to the question, "Did you attempt to destroy the documents in question?"* Instead, you have attempted to answer the charges against you by making counter charges of conspiracy to "frame" you against other personnel of your immediate office. [Emphasis added.]

Emphasizing the seriousness of his offense, the Letter concluded (Pet. App. 28):

> * * * The lack of responsibility which has been demonstrated is most unfortunate in a man of your years and background, and gives rise to justified doubt as to your suitability for

> government employment. You are most fortunate, indeed, that loss of life or loss or damage to government aircraft did not result from your misconduct.

Following his unsuccessful appeal to the Civil Service Commission under Section 14 of the Veterans' Preference Act, petitioner instituted the present action.

ARGUMENT

This is a simple dismissal case involving no dispute as to the facts and no important issue of law. Petitioner's dismissal was accomplished in observance of all of the procedural safeguards to which he is entitled, and there is no conflict of decisions on any of the issues presented and decided below.

1. Three of petitioner's four objections to the proceedings leading up to his dismissal relate to the legal sufficiency of the Statement of Charges and the Letter of Dismissal. Both courts below were clearly correct rejecting these contentions and in holding that the documents fully complied with the applicable statute and regulations.

a. Petitioner contends first that the Statement of Charges was not sufficiently specific to meet the requirements of Section 14 of the Veterans' Preference Act.

The Statement charged petitioner with "misconduct and lack of responsibility" in carrying out his duties as a Contract Specialist (Pet. App. 22), a charge which the Statement pointed out was substantiated by petitioner's attempt to destroy certain material Government letters and documents. The Statement went

on to identify in meticulous detail the dates and subject matters of these documents and their relation to petitioner's work (Pet. App. 22–24), and advise that the documents had been "recovered, pieced together, and [made] available for examination by you or any other interested person or persons" (Pet. App. 22). See also *supra*, p. 4. Petitioner's inaction in the matters concerned in these documents and his subsequent attempts to destroy the documents constituted, the Statement concluded, evidence of his lack of responsibility and misconduct (Pet. App. 25).

This charge of "misconduct and lack of responsibility," amplified by so detailed a statement, fully supplied the required degree of specificity. It is well settled that no particular form is required in a Statement of Charges so long as, "in the circumstances" of the particular case, it informs the employee "with reasonable certainty and precision of the cause for his removal" (*Deak* v. *Pace*, 185 F. 2d 997, 999 (C. A. D. C.)), and affords an employee "a fair chance to defend himself" (*Baughman* v. *Green*, 229 F. 2d 33, 34 (C. A. D. C.)). Where these conditions are met, the courts have repeatedly upheld statements of charges against attacks on their specificity. See, *e. g.*, *Baughman* v. *Green*, *supra*; *Williams* v. *Cravens*, 210 F. 2d 874 (C. A. D. C.), certiorari denied, 348 U. S. 819; *Mulligan* v. *Dunlap*, 108 F. Supp. 296 (D. D. C.), reversed on other grounds *sub nom.* *Mulligan* v. *Andrews*, 211 F. 2d 28 (C. A. D. C.); and *Engelhardt* v. *United States*, 125 C. Cls. 603. In the instant case, the employing agency, after being apprised of highly improper action on the part of

petitioner, proceeded promptly to draft and serve upon him a carefully drawn statement of charges, spelling out in detail not only the allegations of improper activity, but also the background, surrounding circumstances, and effect of this misconduct. These charges were at least as specific as those sustained by the courts in the above-cited cases and clearly met the requirements of Section 14.

b. Equally without merit is petitioner's further objection that the employing agency should have made an express finding that his discharge was for such cause as will promote the efficiency of the service. The Letter of Dismissal made clear that petitioner was being dismissed because of "misconduct and lack of responsibility as demonstrated" (Pet. App. 27) by his attempt to destroy certain letters, and expressly informed him that "The lack of responsibility which has been demonstrated is most unfortunate in a man of your years and background, and gives rise to justified doubt as to your suitability for government employment" (Pet. App. 28). It is settled that "the mere absence of an express invocation of the statutory standard cannot, under such circumstances, have an effect on the validity of an otherwise valid personnel action." *DeBusk* v. *United States*, 132 C. Cls. 790, 794; see also *Blackmon* v. *Lee*, 205 F. 2d 13 (C. A. D. C.).

c. Petitioner claims also that the employing agency failed to make specific findings that he in fact committed the actions with which he was charged.

As noted above, the Statement of Charges had advised petitioner specifically and in detail of the rea-

sons for his proposed discharge, charging him with "misconduct and lack of responsibility" and proceeded in explicit detail to document this charge. The Letter of Dismissal expressly stated that the decision had been made to remove him for "misconduct" (Pet. App. 27) and demonstrated "lack of responsibility" (Pet. App. 28). The letter referred directly to the Statement of Charges, restated the reasons that the removal action was contemplated, and pointed out that petitioner had had opportunity to examine the documents involved, to reply to the charges, and to attend a hearing (Pet. App. 27). It summarized the documents involved (Pet. App. 27), recapitulated the facts upon which the removal action was based, and then stated (Pet. App. 28) "* * * since you have offered no information to nullify the charges, the decision has been made to remove you from the service." The Letter also pointed out that at no time had petitioner ever given a direct answer to the question whether he had attempted to destroy the documents in question, but instead had attempted to answer the charges against him only by making countercharges of conspiracy (Pet. App. 28). Finally, the Letter expressly stated (Pet. App. 28), "*The lack of responsibility which has been demonstrated* is most unfortunate in a man of your years and background, and gives rise to justified doubt as to your suitability for government employment" (emphasis added). Clearly this lengthy and carefully considered letter amply supplied the "reasons given in writing" as required by Section 14 of the Veterans' Preference Act (*supra*, p. 2). *Blackmon* v. *Lee*, 205 F. 2d

13, 14 (C. A. D. C.); *Green* v. *Baughman*, C. A. D. C. No. 13500 (January 31, 1957).

2. Petitioner, for the first time in these proceedings, makes the additional contention that he was denied the right to answer charges personally before the administrative officer responsible for his removal. Asserting that there is a conflict of decisions on the question of whether Section 14 confers a right to a personal hearing before the employing agency in addition to the hearing by the Civil Service Commission,[6] he urges this Court to resolve the issue by granting certiorari in the instant case.

The issue, however, is raised too late in this case; at no point in the course of the administrative or judicial proceedings did petitioner make any claim of right to a preliminary hearing before the employing agency. In any event, the undisputed facts of record clearly demonstrate that petitioner, subsequent to the service upon him of the Statement of Charges, did in fact personally appear at a conference in the office of his Branch Chief "in an attempt to clarify the issues involved and to be sure that the decision regarding [his] proposed removal could be made as fairly as possible" (Pet. App. 27). This conference satisfied whatever right petitioner may have had to answer the charges against him "personally" within the meaning of Section 14. The issue on which the alleged conflict exists, therefore, is not reached in this case.

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[6] Compare *Washington* v. *Summerfield*, 228 F. 2d 452 (C. A. D. C.), with *Washington* v. *United States*, C. Cls. No. 44-56, decided January 16, 1957.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

PHILIP. STEPHEN LEONARD,
Acting Assistant Attorney General.

MELVIN RICHTER,
ROBERT S. GREEN,
Attorneys.

MARCH 1957.

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